

IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF UTAH  
CENTRAL DIVISION

MICHAEL YATES, individually and )  
on behalf of others similarly )  
situated, )  
Plaintiffs, )  
vs. ) Case No. 2:19-CV-723DAK  
TRAEGER PELLET GRILLS, a )  
Delaware limited liability )  
company, )  
Defendant. )  
\_\_\_\_\_)

BEFORE THE HONORABLE DALE A. KIMBALL  
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March 14, 2024

Motion Hearing



## A P P E A R A N C E S

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1 March 14, 2024

10:00 a.m.

2 P R O C E E D I N G S

3  
4 THE COURT: Good morning, everyone.

5 We're here in the matter of Yates versus Traeger  
6 Pellet Grills, 2:19-CV-723. The plaintiff is represented by  
7 Mr. Jared Scott. Mr. Scott, Mr. Jacob Nelson and Mr. Karl  
8 Kronenberger, correct?

9 The defendant is represented by Mr. James Speyer,  
10 Ms. Julianne Blanche and Ms. Juliette White, correct?

11 Mr. Scott, this is your motion for summary  
12 judgment, correct?

13 MR. SCOTT: Correct, Your Honor.

14 THE COURT: Go ahead.

15 MR. SCOTT: As Your Honor has probably seen from  
16 the docket, this case has been going for a while. We have  
17 had a fair number of proceedings with Judge Jenkins who made  
18 a variety of findings, including certifying the class. In  
19 that process --

20 THE COURT: I have seen all of that, yes.

21 MR. SCOTT: Judge Jenkins saw a lot of evidence  
22 and I am going to show you some of the same evidence that he  
23 saw today. This is the packaging that is at issue. It is  
24 the hickory pellets. The mesquite ones look almost  
25 identical but say mesquite. It says hickory, 100-percent



1 pure hardwood pellets. It also says 100-percent food grade  
2 hardwood pellets here. 100-percent pure hardwood pellets  
3 here. It makes the same representation two more times on  
4 the back.

5 It turns out that any way that you read this  
6 statement it is false. These pellets were not hickory or  
7 mesquite as the case may be. They are not 100-percent pure  
8 hardwood pellets. In fact, if you look at the recipe and  
9 the patent application for the pellets, you will find that  
10 by parts it is approximately 22-percent something other than  
11 hardwood.

12 Complicating it even further is that these pellets  
13 are not even hickory wood. There are base woods, cheaper  
14 woods, oak and alder, mixed in. In the mesquite pellets --  
15 no package of mesquite pellets created during the class  
16 period ever had any mesquite wood in them at all. So no  
17 matter how you read this, if you're looking for hickory,  
18 you're not getting it. If you are looking for mesquite, you  
19 are not getting it. If you are looking for 100-percent pure  
20 hardwood pellets, you're not getting it.

21 THE COURT: Your argument is that there are no  
22 material undisputed issues of fact?

23 MR. SCOTT: That is correct, Your Honor.

24 THE COURT: Most of these cases are decided by a  
25 jury. Aren't they fact questions?



1 MR. SCOTT: Yep. In most of the cases when  
2 somebody says 100-percent pure something and it contains  
3 22 percent of other things, that is pretty clear evidence  
4 that there is a misrepresentation. So there is still going  
5 to be some meat on the bone for the jury here, but we are  
6 seeking a finding only that the packaging at issue here that  
7 I just showed you violates the Utah Consumer Sales Practices  
8 Act and the three California statutes.

9 THE COURT: You are not seeking remedies other  
10 than that finding.

11 Is that right?

12 MR. SCOTT: That is correct, Your Honor.

13 It will leave to Your Honor or the jury later the  
14 scope of the appropriate injunctive and declaratory relief  
15 and ancillary relief under the Utah Consumer Sales Practices  
16 Act as well as the issue of damages.

17 THE COURT: Why shouldn't they be looking at that  
18 and instead of you waving it in front of me, why don't you  
19 wave it in front of them?

20 MR. SCOTT: We will, I'm sure, Your Honor.

21 The purpose of summary judgment is to narrow the  
22 issues for trial. Also, it has the side benefit of  
23 promoting settlement, which is a favored policy in federal  
24 cases to promote settlement. So Rule 56 allows us to seek  
25 partial summary judgment to narrow the issues at trial, and



1 that is our goal here is to narrow the need for trial. When  
2 the facts are undisputed as they are here, it is  
3 appropriate.

4 The argument here boils down to two things. Two  
5 things have to be true for Traeger to prevail today. Number  
6 one is you have to believe their declarations and evidence  
7 that the pellets are actually 100-percent hardwood.

8 Now, this seems very strange to me considering  
9 they admit there are other ingredients. If I buy a bottle  
10 of 100-percent pure drinking water and it contains 22  
11 percent of something else, I'm going to be concerned. It is  
12 not 100-percent pure.

13 The same principle applies here. They have this  
14 sham affidavit that says, hey, it is 100-percent pure  
15 hardwood because it tastes like it, and we have to use other  
16 ingredients where we can't make the pellets. It does not  
17 matter why it is false. It is false. They are  
18 misrepresenting to consumers over the course of many years  
19 that their pellets were 100-percent pure hardwood when they  
20 weren't, that they were mesquite or hickory when they  
21 weren't.

22 THE COURT: Aren't these the kind of cases where  
23 there are a lot of consumer surveys --

24 MR. SCOTT: Typically, but not required.

25 THE COURT: -- and several experts?



1 MR. SCOTT: Typically, but not required for our  
2 purposes today and there are two reasons why. Under the  
3 Utah Consumer Sales Practices Act, there is no requirement  
4 for reliance. In advertising a misrepresentation can  
5 violate the Utah Consumer Sales Practices Act with no  
6 requirement for reliance except for actual damages. Since  
7 we are not talking about damages today, we are talking about  
8 just the finding that it was violated, we don't have to  
9 prove that anyone was misled in any way. We just have to  
10 prove that the statements were false.

11 That is why if Your Honor agrees with us that  
12 something that contains 22-percent oils is not 100-percent  
13 hardwood, we win on that claim.

14 The same thing under the California act. They  
15 could go on and say you need all this extrinsic evidence.  
16 Well, they ignore the fact that those cases say that if it  
17 is false, then you don't have to show extrinsic evidence.  
18 You have to show intrinsic evidence of falsity or extrinsic  
19 evidence that it is misleading. So their argument is that  
20 we don't have evidence that it is misleading. They brush  
21 over it and they say it is not false, and because the  
22 statements are not false you have to show extrinsic evidence  
23 that people were actually confused. That is not true when  
24 it is false. If Your Honor finds that these pellets that  
25 contain 22-percent oil are not 100-percent pure hardwood, we



1 win on the California and the Utah claims.

2 THE COURT: What are your best cases that you cite  
3 on this kind of a question?

4 MR. SCOTT: This kind of a question?  
5 Unfortunately, there is a dearth of cases under the Utah  
6 Consumer Sales Practices Act, so we are relying primarily on  
7 the plain language of the statute. In California, and you  
8 will have to excuse me, Your Honor, but Mr. Kronenberger, my  
9 colleague, is a California attorney and if we get too far  
10 into California he may have to step up and provide you more  
11 details on that. But the cases that we cite deal with the  
12 situation -- if we even look at -- maybe it is easier this  
13 way.

14 Let's look at the cases cited by Traeger in their  
15 opposition. If we look at page 19 of their opposition they  
16 cite cases that stand for this exact principle and we have  
17 cited some of them too in ours, but I think using theirs to  
18 illustrate this point makes it very clear.

19 This is under the Lanham Act, which the California  
20 statutes actually require less consumer surveys than the  
21 Lanham Act, but they are citing William H. Morris Co. versus  
22 Group W., Inc. case. The quote that they use is where a  
23 statement is not literally false and is only misleading in  
24 context, however, proof that the advertising actually  
25 conveyed the implied message and, thereby, deceived a



1 significant portion of the recipients becomes critical.

2 The other case they cite is Ries versus Arizona  
3 Beverages. In that case the court granted summary judgment  
4 because there wasn't -- in that case the question was  
5 whether citric acid is natural. In that case there was no  
6 concession that the ingredients were not all natural because  
7 Arizona Beverages argued that citric acid was a natural  
8 thing.

9 THE COURT: What court decided that case?

10 MR. SCOTT: That is the Northern District of  
11 California.

12 In that case the court said that the plaintiffs  
13 have neither intrinsic evidence that labels are false or  
14 extrinsic evidence that a significant portion of the  
15 consuming public would be confused by them. It is  
16 either-or. You get to choose. You can either show it is  
17 false or you show it is misleading.

18 We actually have both here. Without doing our own  
19 consumer survey, which is expressly not required, we have  
20 proof of falsity and proof of the misleading nature, but we  
21 only have to show that it was false and then the requirement  
22 of doing surveys and showing that people were misled is not  
23 required.

24 It makes sense, too, because if Your Honor looks  
25 at this, this is not like a contract where the terms are



1     ambiguous and subject to multiple interpretations.

2     100-percent pure hardwood pellets can't mean anything other  
3     than 100-percent pure hardwood pellets. I know they have  
4     tried to torture the definition of pure and 100 percent  
5     beyond recognition, but if we look at it reasonably, no  
6     reasonable person can interpret that in any other way.

7             The other thing that has to be true for Traeger to  
8     prevail on the whole motion is that our claims have to be  
9     somehow more limited than we have litigated in the entire  
10    case. This is an issue that --

11            THE COURT: What do you mean by that?

12            MR. SCOTT: They say, well, you only said -- their  
13     argument is because the complaint in a few parts says that  
14     the deceptive thing is that it is not actually hickory,  
15     predominantly hickory or predominantly mesquite, that the  
16     100-percent pure hardwood portion is not at play. This has  
17     been briefed multiple times in this case and it was argued  
18     in the certification, and Judge Jenkins after hearing all of  
19     that evidence and seeing the briefing two times, because he  
20     had us brief and argue the certification issue twice, he  
21     concluded that Traeger has misrepresented the contents of  
22     its pellet bags because the bags are not 100-percent  
23     hardwood pellets of any kind and --

24            THE COURT: You need to slow down.

25            MR. SCOTT: Sorry. I will start over and go slow.



1 I apologize.

2 THE COURT: The reporter may beat me up after if I  
3 don't ask you to slow down.

4 MR. SCOTT: He would be right to do so.

5 Traeger has misrepresented the contents of its  
6 pellet bags because the bags are not 100-percent pure  
7 hardwood pellets of any kind and certainly not 100-percent  
8 pure nor all natural hickory or mesquite. That was from  
9 Judge Jenkins' order last September or August certifying the  
10 class.

11 THE COURT: Am I bound by that finding?

12 MR. SCOTT: No, you are not, Your Honor, but what  
13 is important here is that he made that finding with the same  
14 evidence and it is consistent with what the evidence  
15 actually shows.

16 Also, the dispute I'm talking about here is what  
17 claims are at issue. They are essentially taking the  
18 position that if we allege five breaches of contract and  
19 then we find three more during discovery or we just knew  
20 about them but didn't include them in the complaint, that we  
21 can't pursue those. That is not how this works. They have  
22 cited no law saying our complaint should be limited this  
23 way, plus we have cited all of the other representations in  
24 the complaint where we say, hey, these contain oil, these  
25 contain oil and they are not pure hardwood. We have five or



1 six. We also cited to some of the briefing. If Your Honor  
2 needs to go back and look at it and the certification, we  
3 have already cited to where this has already been disputed  
4 and Judge Jenkins made those findings after hearing those  
5 arguments, so this has been part of the case the whole time.

6 This statement, 100-percent pure hardwood pellets,  
7 and if this is false and if our complaint is not  
8 artificially limited based on the say-so of counsel, they  
9 lose their motion for summary judgment because every single  
10 one of their arguments depends on those two issues, every  
11 single one of them.

12 Under the Utah Consumer Sales Practices Act --  
13 there are basically two types of relief under the Utah  
14 Consumer Sales Practices Act, and to get damages in a class  
15 action, which raises a whole other argument, you have to  
16 prove that you suffered actual damages as a result of the  
17 violations of the Utah Consumer Sales Practices Act, but for  
18 injunctive, declaratory and ancillary relief there is no  
19 such requirement. Indeed, Judge Jenkins expressly  
20 recognized that proposition in his order.

21 If Traeger misrepresented the contents of its  
22 pellets, which it did -- indisputably we have the recipe, we  
23 have 30(b)(6) deposition testimony, we have their patent  
24 application, we have interrogatory responses and every  
25 single thing says they have something other than 100-percent



1 pure hardwood in their pellets. They have an affidavit,  
2 that we have called a sham affidavit here and we have  
3 objected to it, that says, yeah, we put other stuff in but  
4 they are still 100-percent hardwood, which just makes no  
5 sense and needs to be rejected.

6 Then going through the Utah Consumer Sales  
7 Practices Act, they argue that, hey, we have no evidence  
8 that their acts were knowing or intentional. That is one of  
9 the requirements under the Utah Consumer Sales Practices  
10 Act. You can't knowingly or intentionally do this. They  
11 put in an affidavit saying, well, we didn't think we were  
12 deceiving anyone and it wasn't knowing or intentional  
13 because these pellets give predominantly the flavor of the  
14 named woods, and so they are 100-percent hardwood and we  
15 didn't know we were deceiving people. That is not how  
16 knowing and intentional is considered under Utah law.

17 With knowingly there is a statute on it. He is  
18 aware of the nature of his conduct of the existing  
19 circumstances. That is Utah Code 76-2-103(2). So was  
20 Traeger aware of the nature of its content or the existing  
21 circumstances?

22 In our undisputed facts we showed that Traeger  
23 created the recipe for the pellets, they own the whole  
24 entire manufacturing process, they also created the  
25 marketing at issue and they created this statement, the



1 100-percent pure hardwood pellets, while knowing that their  
2 pellets actually contain other ingredients and that they are  
3 not hickory and they are not mesquite. So the knowing  
4 standard is not that they knew they were intentionally  
5 deceiving, which is how they try to frame it, but that they  
6 just knew the existing circumstances, and that we have  
7 established with our undisputed facts.

8 In fact, I think we can go further and show that  
9 it was deceptive, intentionally deceptive, but we don't have  
10 to go there and that is an alternative basis, right, knowing  
11 or intentional, but intentional is when it is a conscious  
12 objective or desire to engage in the conduct. Was it their  
13 desire to engage in the marketing conduct that they did and  
14 to represent that it was 100-percent pure hardwood hickory  
15 or mesquite when it wasn't? Absolutely. That is  
16 established by the undisputed fact that they knew what was  
17 in the pellets and that they were intentionally marketing  
18 them. We have pointed out that they created the packaging  
19 and it is all undisputed that they created the packaging and  
20 they created the pellets and they applied for patents and  
21 they created the recipes and they run the mills that create  
22 the pellets.

23 In fact, if you read the back of the packaging it  
24 talks about how their pellets are better, because in  
25 contrast with other wood pellet suppliers who don't own



1 their own wood pellet production facilities, Traeger can  
2 guarantee that nothing harmful is cooking your food. They  
3 knew the entire process.

4 THE COURT: Are you alleging that there was  
5 something harmful? I thought you were alleging that they  
6 misrepresented the ingredients?

7 MR. SCOTT: We are not alleging that it was  
8 necessarily harmful and that is not part of our case, just  
9 that they are misrepresenting it and they knew it because  
10 they controlled the whole entire process. In fact, they  
11 bragged about controlling the whole entire process.

12 We meet the standard for knowing and intentional  
13 violations -- knowing and intentional acts, which do end up  
14 violating the Utah Consumer Sales Practices Act. We don't  
15 have to show that Traeger knew that their acts violated the  
16 Utah Consumer Sales Practices Act, just that they knew and  
17 were aware of the nature of the conduct or the existing  
18 circumstances. It is a low bar, Your Honor.

19 All that said, the Utah Consumer Sales Practices  
20 Act actually has another provision that is interesting. If  
21 this misrepresentation was based on a bona fide error, which  
22 is basically what they are saying, oh, we thought it was  
23 100-percent pure hardwood because it tasted like it, there  
24 is still a violation of the Utah Consumer Sales Practices  
25 Act because it says if it is a bona fide error, the statute



1 limits damages to the amount in which the supplier was  
2 unjustly enriched by the violation. So even if it was  
3 unintentional and even if it was unknowing and based on an  
4 error --

5 THE COURT: You're saying it does not affect  
6 liability but it may limit damages?

7 MR. SCOTT: Exactly. It sets the floor for  
8 damages and unjust enrichment. That is Utah Code  
9 13-11-19(4)(c). Even if Traeger is right that they didn't  
10 know or intentionally do this, it is just an issue of the  
11 amount of damages.

12 Traeger argues that we had to prove causation  
13 under the statute. Again, they rely on Section 13-11-19(3)  
14 and it says whether a consumer seeks or is entitled to  
15 recover damages -- wait. They don't rely on that.

16 We rely on this portion that says whether a  
17 consumer seeks or is entitled to recover damages or has an  
18 adequate remedy at law he may bring a class action for  
19 declaratory judgment, an injunction, and appropriate  
20 ancillary relief. That contrasts with the actual damages  
21 that have to be as a result of a violation of the Act.

22 We assert claims and we say, okay, these  
23 misrepresentations, the hickory 100-percent pure hardwood  
24 and mesquite 100-percent pure hardwood misrepresentations  
25 violate the text of the Utah Consumer Sales Practices Act



1 and the administrative rules promulgated under the Utah  
2 Consumer Sales Practices Act.

3 Traeger says, hey, hey, hey, you can't rely on the  
4 text of the statute. That is true for the damages claim  
5 only, because Section 13-11-19(4)(a) states a consumer who  
6 suffers a loss as a result of the violation of this chapter  
7 may bring a class action for the actual damages caused by an  
8 act or practice specified as violating this chapter by a  
9 rule adopted by the enforcing authority. So for damages, if  
10 Shady Grove and its progeny don't eliminate that provision,  
11 because it is inconsistent with Rule 23 -- if, however, it  
12 doesn't, we would be limited to violations of the rules, but  
13 that does not apply to claims for injunctive, declaratory  
14 and ancillary relief. So we argue, based on that, that  
15 these misrepresentations violate both the plain language of  
16 the statute and the plain language of the rule.

17 Specifically -- my binder just popped so I'm going  
18 to have a mess here for the rest of the time and I  
19 apologize. These big binders get you.

20 THE COURT: You need better binders.

21 MR. SCOTT: Yes, I know. I need to invest in a  
22 better binder company somehow.

23 All right. It will work out.

24 If we go back to our motion for summary judgment,  
25 we lay out the specifics of what was violated. It is a



1 violation of the plain language of the Utah Consumer Sales  
2 Practices Act to indicate that the subject of a consumer  
3 transaction has sponsorship, approval, performance,  
4 characteristics, accessories, uses or benefits --

5 THE COURT: Slow down a little, when you read  
6 particularly.

7 MR. SCOTT: Sorry. The main issue is that it is a  
8 violation to indicate that the subject of a consumer  
9 transaction has, and this is relevant here, has  
10 characteristics, if it has not. So the characteristics that  
11 Traeger claims the pellets have is that they are hickory  
12 100-percent pure hardwood or mesquite 100-percent pure  
13 hardwood when they are not.

14 Again, no matter how you break that down it is  
15 false. If you read the whole thing or if you break it into  
16 parts, it is always false. They are misrepresenting the  
17 characteristics of the pellets. That is 13-11-4(2)(a).

18 Now, 13-11-4(2)(b) says it is a violation to  
19 indicate that the subject of a consumer transaction is of a  
20 particular standard, quality, grade, style or model if it is  
21 not. So to represent that the pellets are mesquite or  
22 hickory when they are not, or 100-percent pure hardwood when  
23 they are not, or the combined phrase of hickory 100-percent  
24 pure hardwood or mesquite 100-percent pure hardwood when  
25 they are not, that is a violation of the statute. That



1 entitles plaintiffs to injunctive, declaratory and ancillary  
2 relief at a minimum.

3           The rules promulgated under the Utah Consumer  
4 Sales Practices Act echo a lot of this language. These are  
5 the ones what are applicable to both the non-damages relief  
6 and damages. One of them, which is Utah Administrative Code  
7 R152-11(3)(b) Section 5 says a supplier misrepresents the  
8 price, savings, quality or ownership of any goods sold, and  
9 1-B of that same section says it is a violation to deliver,  
10 offer consumer commodities which are unusable or  
11 impracticable for the purposes represented or a material  
12 difference from the offered consumer commodity. So  
13 representing something is 100-percent pure hardwood and  
14 giving them something else is a violation of the rules.

15           We can establish here pretty clearly a violation  
16 of both the plain language of the statute and the rules.  
17 Under those circumstances we are entitled to summary  
18 judgment that the packaging violates the Utah Consumer Sales  
19 Practices Act.

20           THE COURT: What else do you want to tell me?

21           MR. SCOTT: Well, I want to talk a little bit  
22 about the California law, and if you have too many questions  
23 I will have to defer to my colleague.

24           What we are alleging with respect to the  
25 California statutes is similar because it contains similar



1 language. These are consumer statutes.

2 THE COURT: They are not materially different?

3 MR. SCOTT: There are some material differences  
4 and I will try to go over those.

5 The ones that are the closest are the C.L.R.A.  
6 That is probably the closest to the Utah Consumer Sales  
7 Practices Act, but we have also alleged claims under the  
8 Unfair Competition Act and the False Advertising Law of  
9 California.

10 If we look at -- sorry. I'm all torn up here.

11 So the Unfair Competition Law incorporates by  
12 reference claims under the False Advertising Law, so a  
13 violation of the False Advertising Law also violates the  
14 Unfair Competition Law. So we take that and we say, okay,  
15 what does the False Advertising Law say, the F.A.L., and we  
16 have referenced it, and it says the F.A.L. prohibits any  
17 advertising device which is, quote, untrue or misleading.

18 So if these statements on the packaging are found  
19 to be untrue, which they should be, it is a violation of the  
20 fair advertising law in California and the Unfair  
21 Competition Law. So we get a two for one on that one.

22 The distinguishing factor between false and  
23 misleading is if something is true but misleading, it is  
24 still a violation of the law. That is where Traeger focuses  
25 all of its energy by saying, well, you have to show that it



1 is misleading and --

2 THE COURT: It could be just one or the other or  
3 both? That is your argument, correct?

4 MR. SCOTT: Exactly.

5 Since it is false, we meet that. It is  
6 misleading, though, because there is no other way to  
7 interpret these statements. I mean 100-percent pure  
8 hardwood -- there is no way to interpret that any other way  
9 other than saying it is nothing other than hardwood. It is  
10 misleading.

11 Again, going to the comparison of an unambiguous  
12 contract, this is not a case where you say reasonable people  
13 could disagree on what this means. There is only one  
14 interpretation and it is that it is 100-percent pure  
15 hardwood and that is why it is false.

16 In California the C.L.R.A., which is the one that  
17 is probably most analogous to the Utah Consumer Sales  
18 Practices Act, prohibits the same kind of thing like  
19 representing that a consumer good has characteristics that  
20 they do not have. That is California civil code --

21 THE COURT: So if the Utah statute is violated,  
22 then the C.L.R.A. is violated? That is your argument?

23 MR. SCOTT: Correct.

24 Again, this will sound very familiar, because it  
25 also prohibits representing that goods are of a particular



1 standard, quality or grade if they are another.

2 This is a little bit different, and we do get into  
3 this a little bit in our briefing under the Utah Consumer  
4 Sales Practices Act rules, and in particular advertising  
5 goods or services with the intent not to sell them as  
6 advertised. So they are advertising them as 100-percent  
7 pure hardwood and they are not selling 100-percent pure  
8 hardwood and that violates the C.L.R.A., representing that  
9 the subject of a transaction has been supplied in accordance  
10 with a previous representation when it is not. So  
11 representing that it is 100-percent pure hardwood and  
12 providing mesquite 100-percent pure hardwood or hickory  
13 100-percent pure hardwood and then providing oak and alder  
14 mixed with oils is a violation of the C.L.R.A.

15 There is some dispute in the cases and there are  
16 inconsistent cases on what has to be shown, materiality  
17 under the California statutes, because for damages and other  
18 relief we have to show materiality. We would argue two  
19 things. Well, three, actually.

20 Number one, that it is material as a matter of  
21 law, these statements. It is the biggest writing on the  
22 package and it appears five times on the package. If it  
23 wasn't material and Traeger didn't know it was material, why  
24 did they emphasize this more than literally anything else?  
25 Nothing else on this packaging is repeated even close to



1 five times, yet that is what they have here. Obviously if  
2 you were going to buy mesquite pellets you expect them to be  
3 mesquite.

4 Number two, there are cases under California law  
5 saying that for class actions, only the named plaintiff has  
6 to show materiality as to him and that that is enough to  
7 survive a class action. We have cited those cases and they  
8 have cited cases suggesting that there is more, but those  
9 are usually in the actual reliance context or the misleading  
10 context, which we don't have to show here when the  
11 statements are actually false.

12 Additionally, Traeger when they were deciding what  
13 to put on their packaging, they did some consumer surveys  
14 and they tried to find out what would be important for  
15 consumers to see on the packaging. They asked a whole  
16 variety of questions. One of the questions they asked is --  
17 they had like ten different categories and they said is this  
18 the reason you buy, not important, or I don't know, and  
19 there are a couple of other categories.

20 One of the things they asked customers to decide  
21 whether it was important was whether the pellets were  
22 100-percent pure hardwood. That might sound familiar  
23 because that is exactly what ended up on the package, and I  
24 can tell you why, because 99.25 percent of consumers in that  
25 survey, Traeger's own survey found that that was either



1 important or the reason they buy the pellets. So Traeger's  
2 own data shows it was material. That was more material than  
3 any of the other factors they asked consumers about. None  
4 of them had the combined percentages of 99.25 or higher.  
5 Not even close. It was 132 out of 133 respondents that said  
6 it was at least important. So then we say, okay, now we  
7 understand why they put it on the bag five times. Nothing  
8 was more material to consumers.

9 Now, they put it on the bags without regard to  
10 whether it was true or not, which is why we are here, but  
11 this is certainly material under these statutes for those  
12 three reasons.

13 Again, the Utah law does not require any of that  
14 showing to show a violation.

15 I'm happy to answer any other questions you have,  
16 Your Honor.

17 THE COURT: I don't have anymore right now.

18 Thank you, Mr. Scott.

19 Mr. Speyer.

20 MR. SPEYER: Thank you, Your Honor. It is nice to  
21 meet you in person.

22 THE COURT: Thank you.

23 MR. SPEYER: Your Honor, it is stunning to me that  
24 essentially Mr. Scott's entire presentation was based on the  
25 assertion that the claim 100-percent pure hardwood is a



1 claim that is alleged in this case. But before I get into  
2 that and just to level set, I want to discuss why even if  
3 100-percent pure hardwood, that statement were to be in this  
4 case, there would still be a disputed issue of fact. That  
5 is because as the declarations that Traeger has submitted  
6 show, the wood in Traeger's bags is hardwood as opposed to  
7 softwood. That is an important distinction for barbecue  
8 owners because hardwood burns much longer and gives the  
9 barbecue owner a much more even burn.

10 THE COURT: What is your claim about what it means  
11 to say 100-percent pure hardwood? What does that mean do  
12 you think?

13 MR. SPEYER: Well, there are two answers to that,  
14 Your Honor. It is 100-percent pure hardwood as opposed to  
15 softwood. There is no dispute that there is no softwood in  
16 the bag. That is number one. Number two, we heard a lot  
17 about how the bag is 22-percent oils. Okay. It is  
18 apparently, according to them, 78 percent wood and  
19 22-percent oil. That is just flat-out wrong. By weight --  
20 by weight, when you weigh the bag with just the hardwood  
21 pellets and then you add in the oil, which are the only  
22 ingredients, the oil represents less than one-half of one  
23 percent of the bag by weight.

24 So we're talking about a bag that is 99.5-percent  
25 hardwood, which in other contexts, other government contexts



1 like the F.D.A. is simply a rounding error. The F.D.A.  
2 allows you to say something has zero calories even if it has  
3 half a calorie.

4 We need to put all of that aside, Your Honor,  
5 because the plaintiffs are seeking summary judgment on a  
6 claim that is not in the complaint and not part of this  
7 case. The complaint is focused exclusively on the claim  
8 that Traeger misrepresented the type of wood in its pellets.  
9 Traeger said this contains mesquite wood, and that is the  
10 allegation, when it does not. The allegation is that  
11 Traeger said that this represents hickory wood, when it does  
12 not.

13 Now, the plaintiffs' contention that their  
14 complaint encompasses the very different claim that the  
15 pellets are 100-percent pure hardwood, okay, and they make  
16 this contention despite three undisputed facts. Number one,  
17 the complaint does not allege anywhere that the phrase  
18 100-percent pure hardwood is false or deceptive. Number  
19 two, the complaint does not allege anywhere that any  
20 plaintiff relied on the 100-percent pure hardwood statement  
21 or that the statement caused any plaintiff to buy the  
22 product. Number three, the complaint does not allege  
23 anywhere that the 100-percent pure hardwood statement  
24 violated any consumer protection statute or any other law.

25 Now, under basic rules of pleading, Your Honor, if



1 you miss out on one of those allegations you have failed to  
2 state a claim. The plaintiffs' claim is zero for three on  
3 those allegations. What is more is that the plaintiffs in  
4 their reply admit, as they must under basic rules of  
5 pleading, that they were required in their complaint to,  
6 quote, identify the deceptive statements that Traeger made  
7 on its packaging, and that is at page 10 of their reply,  
8 Your Honor, and the complaint nowhere identifies the  
9 statement 100-percent pure hardwood as a false or deceptive  
10 statement and that failure is dispositive.

11 Simply put, the complaint does not give Traeger  
12 the fair notice to which it is entitled that they are  
13 asserting a claim based on 100-percent pure hardwood. There  
14 is just no way a reasonable reader can review that complaint  
15 and come away saying, yes, they are clearly saying that the  
16 phrase 100-percent pure hardwood is false. There is no way  
17 to do it.

18 Let me put it another way, Your Honor. If you  
19 were filing a lawsuit because you believed a company had  
20 misrepresented its product as 100-percent pure hardwood,  
21 what you do is pretty straightforward. You would allege  
22 that the statement 100-percent pure hardwood is false or  
23 deceptive, and you would allege that the plaintiffs relied  
24 on that statement, and you would allege that that statement  
25 violated some law.



1 THE COURT: Should I give them leave to amend?

2 MR. SPEYER: You should not, Your Honor. I can  
3 get to that down the line or I can get to that right now.

4 THE COURT: You decide.

5 MR. SPEYER: Okay. Thank you, Your Honor.

6 Instead of saying anything about the alleged  
7 misrepresentation 100-percent pure hardwood, the complaint  
8 is focused exclusively on the claim that Traeger  
9 misrepresented the type of pellets, the type of wood in its  
10 pellets.

11 Let me quickly review the allegations. We're  
12 going to put something up on the screen.

13 Is that okay, Your Honor?

14 THE COURT: Sure.

15 MR. SPEYER: Would you also like hard copies or is  
16 the screen sufficient?

17 THE COURT: Do you have hard copies?

18 MR. SPEYER: I do have hard copies for both you  
19 and counsel.

20 THE COURT: Let's do hard copies, too.

21 MR. SPEYER: Okay.

22 THE COURT: This illustrates one of the joys of  
23 dealing with gizmos.

24 MR. SPEYER: That is the bane of my existence,  
25 Your Honor.



1 THE COURT: And everyone else's.

2 MR. SPEYER: Well, kids are okay.

3 THE COURT: Yeah, kids are okay.

4 MR. SPEYER: We can just do this on the papers.

5 So can you go back to the first page, please,  
6 Sheila, just the cover page?

7 Your Honor, this is the operative complaint.

8 Let's go to the first paragraph, Sheila. The  
9 first paragraph, second sentence, as set forth before, the  
10 defendant wrongly and unfairly deceived the public and its  
11 customers --

12 THE COURT: You need to slow down if you're going  
13 to read.

14 MR. SPEYER: Yes, Your Honor.

15 As set forth below, the defendant wrongfully and  
16 unfairly deceived the public and its customers by  
17 misrepresenting that its wood pellets comprised one type of  
18 wood when in fact the pellets comprised a different type of  
19 less expensive wood containing flavored oils to masquerade  
20 as more expensive sought after grilling woods.

21 There is nothing there about the phrase  
22 100-percent pure hardwood being false.

23 Can we go to the next page, please?

24 Paragraph eight. In marketing and selling its  
25 wood pellets, the defendant uniformly represented that its



1 wood pellets comprised a specific type of wood.

2 Paragraph ten. The defendant's representations  
3 about the wood pellets are false. Nothing about 100-percent  
4 pure hardwood.

5 Can we go to paragraph 19, please, Sheila.

6 There we go.

7 Paragraph 19. Plaintiff Yates would not have  
8 purchased the defendant's mesquite barbecue wood pellets had  
9 he known that they did not comprise mesquite wood. Nothing  
10 about 100 percent pure hardwood.

11 Can we go to paragraph 96, please.

12 I'm sorry. Let's skip that.

13 Let's go to paragraph 112.

14 Paragraph 112. Here are the common questions of  
15 law and fact that the plaintiffs say exist. A, what  
16 different types of wood comprised the pellets; B, whether  
17 the defendant misrepresented that Traeger pellets contain or  
18 comprise certain types of wood; C, whether the defendant's  
19 representations about the types of wood contained in and  
20 comprising the Traeger pellets were false, misleading or  
21 likely to deceive; E, whether the type of wood comprising  
22 the Traeger pellets is a material fact to consumers. Again,  
23 nothing about 100 percent pure hardwood.

24 Let's go to the causes of action themselves.

25 Can you go to page 25, please, Sheila. Paragraph



1 120. There you go.

2 First cause of action. Let's go to the next page,  
3 Sheila.

4 Paragraph 123. The defendant has violated Utah  
5 Code Section 13-11-4(2)(a).

6 Paragraph 124. Specifically by claiming that the  
7 Traeger pellets comprise or primarily comprise certain types  
8 of wood when the Traeger pellets do not comprise or  
9 primarily comprise those types of woods the defendant has  
10 violated the Utah Act.

11 Your Honor, I will represent to the Court that the  
12 second, third and fourth causes of action are completely in  
13 line with this and nothing about how the 100-percent pure  
14 hardwood is a false statement. What the plaintiffs say is,  
15 well, there are instances in the complaint where we talk  
16 about how oils are added to the product. Okay. That is  
17 their justification for how they think 100-percent pure  
18 hardwood is alleged in the complaint. But each time they  
19 talk about oils being in the product, it is in the service  
20 of explaining how Traeger achieves a mesquite or hickory  
21 flavor without mesquite or hickory wood.

22 The defendants are not required to be mind  
23 readers, Your Honor. If the plaintiffs had actually wanted  
24 to state a claim based on 100-percent pure hardwood, they  
25 would have asserted it and it would have been very simple.



1 Another point, Your Honor, is that this case by  
2 the plaintiffs' own admission is limited to two flavors of  
3 Traeger pellets, mesquite and hickory, yet every single  
4 flavor of Traeger pellets contains oil, and every single  
5 flavor of Traeger pellets makes the same statement,  
6 100-percent pure hardwood. If the plaintiffs actually were  
7 suing over the 100-percent pure hardwood statement there  
8 would be no reason for them to limit their case to mesquite  
9 and hickory.

10 Now, also, the plaintiffs claim that regardless of  
11 the complaint, this is how the case has been litigated. The  
12 case has been litigated on the assumption that 100 percent  
13 pure hardwood is part of the case. Your Honor, the exact  
14 opposite is true.

15 Can we go to the next document, please.

16 Your Honor, I'm now showing you a page from the  
17 plaintiffs' opposition to Traeger's first motion to dismiss.  
18 The second sentence is highlighted. For at least the last  
19 several years Traeger has sold bags of pellets that purport  
20 to be specific types of wood like mesquite or hickory, but  
21 in reality are made with cheaper oak and alder woods and  
22 flavored with oils. No mention of this supposed 100-percent  
23 pure hardwood claim.

24 Can we go to the next document, please.

25 Your Honor, this is the defendant's opposition to



1 the second motion to dismiss we filed.

2 The first page of this, please, Sheila.

3 Once again, the exact same description of the case  
4 in their own pleading, Your Honor. For at least the last  
5 several years Traeger has sold bags of pellets that purport  
6 to be specific types of wood like mesquite and hickory.

7 Let's go to the next document.

8 The next document, Your Honor, is the plaintiffs'  
9 own expert report. How do their own experts describe the  
10 case?

11 Let's go to the next page, please.

12 You see here the case overview. Paragraph 15.  
13 The defendant represents that its wood pellets contain a  
14 specific species of wood, such as mesquite, hickory, cherry  
15 or apple in marketing its wood pellets. Allegedly the  
16 defendant's claims are false and the pellets they sell do  
17 not primarily comprise the identified wood. No mention of  
18 this alleged 100-percent pure hardwood claim.

19 Now, the first time they brought up this idea that  
20 100-percent pure hardwood is in the case is in their class  
21 certification motion and, yes, ever since then they have  
22 repeatedly asserted that 100-percent pure hardwood is in the  
23 case. Every time they made that claim, Your Honor, we  
24 showed very clearly that it is not in the complaint and it  
25 could not be part of the case, and it simply cannot be the



1 case that a claim that is not in the complaint somehow  
2 becomes part of the complaint simply because the plaintiffs  
3 keep asserting a false statement.

4 THE COURT: Did Judge Jenkins say anything about  
5 this?

6 MR. SPEYER: Judge Jenkins did not.

7 Your Honor, an amendment after four years of this  
8 case, I think as I have just gone through, would be severely  
9 prejudicial and would force us to relitigate this entire  
10 case. We would have to go through pleading practice again,  
11 we would have to go through fact discovery again, because  
12 Traeger did not depose the plaintiffs on this 100-percent  
13 pure hardwood claim, and we would have to go through expert  
14 discovery again, because both sides' experts submitted  
15 reports based solely on the claim that Traeger  
16 misrepresented the type of pellets, the type of wood in its  
17 pellets and there is nothing about this 100-percent pure  
18 hardwood claim in the expert reports.

19 Since we depended on the expert reports in  
20 opposing our class certification motion, the class  
21 certification motion would have to be redone. Essentially  
22 the entire case would have to be redone, and I would note  
23 that the plaintiffs have not even sought leave to amend.

24 Just to put a bow on this 100-percent pure  
25 hardwood claim, Your Honor, I have never heard of a fraud or



1 false advertising case where the alleged false statement is  
2 not identified in the complaint, where the plaintiffs don't  
3 claim that they relied on the false statement, and where the  
4 complaint does not even assert that the false statement  
5 violated any laws.

6 Putting the 100 percent pure hardwood aside, Your  
7 Honor, and focusing only on the claim that is in the case,  
8 whether Traeger misrepresented the type of pellets, the type  
9 of wood in its pellets, I would like to explain why summary  
10 judgment should be denied.

11 On the Utah Act claim, Your Honor, the Court  
12 should deny summary judgment for two reasons. The first  
13 reason is that causation is an essential element of a claim  
14 under the Utah Act and the plaintiffs do not dispute that  
15 they have no evidence of causation. In the language of the  
16 statute, the consumer must show loss, quote, as a result of,  
17 close quote, the statutory violation. That is Section  
18 13-11-19(4) (a).

19 The plaintiffs don't contest that they have  
20 provided no evidence of causation under the statute. Their  
21 motion does not even mention it. The plaintiffs also do not  
22 dispute that in order to recover damages in this case, that  
23 they have to prove causation. Therefore, there is no  
24 dispute, Your Honor, that summary judgment must be denied on  
25 the plaintiffs' Utah Act damages claim for failure to



1 establish causation.

2 Now, that leaves their claim for injunctive relief  
3 under the Utah Act. The plaintiffs' say, well, we don't  
4 need to prove causation under the Utah Act if we are just  
5 seeking injunctive relief, but they cite no case law for  
6 this proposition. If you think about it, Your Honor, if  
7 their argument were right, then anyone could sue for  
8 injunctive relief under the statute, even if that person  
9 never even saw the alleged false advertising, and even if  
10 the alleged false advertising did not induce the purchase.

11 If you take causation out of the equation you  
12 would convert the Utah Act into a private attorney general  
13 statute. That would mean that Utah's consumer protection  
14 statute is the broadest consumer protection statute in the  
15 country. I'm familiar with consumer protection statutes  
16 throughout the country, but I'm not familiar with any  
17 statute that allows a private attorney general action where  
18 you don't have to show that you even saw the alleged  
19 advertising in order to state a claim.

20 Now, the plaintiffs' only argument on this point  
21 is to quote the statute itself to the effect that a consumer  
22 may bring an action for injunctive relief even if he is not  
23 seeking damages, but damages and causation are obviously two  
24 different elements, Your Honor. They are separate elements  
25 and they must be separately satisfied.



1           The way to illustrate that is a plaintiff can of  
2     course demonstrate causation, that is that the false  
3     statement caused the purchase without having any damages,  
4     without being able to prove any damages. So they are two  
5     different elements. So my point on causation, Your Honor,  
6     is that it is an essential element of any claim under the  
7     Utah Act and the plaintiffs do not contest and they have  
8     submitted no evidence on it and, therefore, summary judgment  
9     under the Utah Act should be denied.

10           The second and independent reason why summary  
11    judgment under the Utah Act should be denied is because  
12    intent to deceive is an essential element of a claim under  
13    the Act. The plaintiffs in their papers did not dispute  
14    that they had no evidence of intent to deceive. The Utah  
15    Supreme Court in the Rawson vs. Conover case that we have  
16    cited to the Court, has made clear that the Utah Act  
17    requires that the defendant, quote, knowingly or  
18    intentionally deceived the consumer. Plaintiffs have  
19    proffered no such evidence.

20           Instead, the plaintiffs claim they don't need to  
21    show an intent to deceive. They only need to show that  
22    Traeger engaged in intentional or knowing conduct, but they  
23    cite no case law to support that assertion and they have no  
24    response to the Utah Supreme Court case holding that an  
25    intent to deceive is required. That is why the Court should



1 deny summary judgment for a second and independent reason on  
2 the Utah Act claim.

3 Quickly turning to the California claims, Your  
4 Honor, again, there are two reasons why the Court should  
5 deny summary judgment. First, the plaintiffs have failed to  
6 establish the essential element of reliance. Plaintiffs  
7 concede in their motion papers at page 10 that reliance is  
8 an essential element of all of the California statutes under  
9 which they are proceeding. They then argue that reliance  
10 can be proven by showing that the statement at issue was  
11 material.

12 But let's assume that you can establish reliance  
13 by showing that the statement is material, that is,  
14 important to a consumer in making his or her purchase.  
15 Okay. Even assuming that you can show reliance via  
16 materiality, Traeger submitted an extensive expert report on  
17 just this subject. Traeger presented consumer surveys  
18 consisting of 800 consumers showing that what consumers  
19 found important is the flavor and consumers did not find  
20 important the type of wood. So if the flavor conveys  
21 mesquite or hickory, that is what is important to the  
22 consumer.

23 We have a 200-page expert report that shows that  
24 on the materiality issue at the very least there is a  
25 disputed issue of fact.



1           In fact, the plaintiffs have submitted no evidence  
2   showing that the type of wood in the pellets is material.  
3   There is nothing, so it would be perverse to award summary  
4   judgment to the party who has produced no evidence on this  
5   issue against the party that has produced evidence on this  
6   issue.

7           Now, the plaintiffs in one line in their reply  
8   brief attack Traeger's expert report and say it is, quote,  
9   flawed and misdirected, close quote. Your Honor, those are  
10   pure conclusions backed up by nothing. Those conclusions  
11   are worthless and they do not come close to establishing  
12   what you would need to exclude the expert report under the  
13   Daubert standards.

14           Now, the plaintiffs also have cited and cited to  
15   you today the court's class certification decision  
16   concerning materiality, but that decision did not consider  
17   Traeger's expert report. Indeed, Judge Jenkins expressly  
18   left consideration of Traeger's expert report for another  
19   day. He said, quote -- let me back up.

20           In addition to the fact that Judge Jenkins did not  
21   consider that report, the law is clear and not contested by  
22   the plaintiffs and, as you noted, the findings made at the  
23   class certification stage are for purposes of class  
24   certification only and are not binding at later stages.  
25   Indeed, Judge Jenkins in his certification order wrote that,



1 quote, this is not the time to conclusively decide the  
2 merits, close quote. That is at page 9 of his ruling at the  
3 top of the page.

4 So on materiality, which is an essential element  
5 under California law, there is at the very least a disputed  
6 issue of fact requiring a denial of the plaintiffs' summary  
7 judgment motion.

8 The second independent reason why summary judgment  
9 is inappropriate under the California statutes is that the  
10 plaintiffs have failed to establish the essential element  
11 that a reasonable consumer would likely be deceived by the  
12 alleged misrepresentation. Here the only alleged  
13 misrepresentation is that Traeger misrepresented the type of  
14 wood in its pellets.

15 Now, also under California law the plaintiffs must  
16 show the likelihood of deception with evidence showing that  
17 a significant portion of consumers could likely be misled.  
18 The plaintiffs in their papers do not dispute that they have  
19 to prove with evidence a likelihood of deception, and those  
20 two propositions require denial of their summary judgment  
21 motion on the California claims, and that is because they  
22 have submitted no evidence showing that the reasonable  
23 consumer would likely be deceived into thinking that the  
24 bags contain primarily mesquite or hickory wood.

25 Now, the plaintiffs with their reply did submit 75



1 pages worth of evidence, okay, but the problem is none of  
2 that evidence is relevant to the only claim that is in the  
3 case, whether Traeger misrepresented that the bags contain  
4 mesquite or hickory wood when they do not. What we have  
5 said earlier and what we have shown in our declarations  
6 opposing summary judgment, Your Honor, is that the phrase  
7 that they quote, mesquite, 100-percent pure hardwood can  
8 certainly be construed as true, because there is no debate  
9 that the bags give the consumer a hearty mesquite flavor and,  
10 we believe, and we believe the facts back us up, that the  
11 pellets are made of pure hardwood.

12 So the likelihood of deception depends on whether  
13 they can show that a reasonable consumer would likely be  
14 deceived by those statements into thinking that the bags  
15 contain not just pellets that give you the flavor of  
16 mesquite, but that the pellets actually contain pure  
17 mesquite or pure hickory and they have no evidence to that  
18 effect, Your Honor.

19 Now, after the plaintiffs submitted their evidence  
20 in their reply, Traeger filed an objection to that evidence.  
21 The objection showed that none of the evidence the  
22 plaintiffs submitted was relevant to the only  
23 misrepresentation alleged in the case. The plaintiffs then  
24 filed their response to the evidentiary objections and that  
25 response was very interesting, Your Honor, because that



1 response did not dispute that they failed to submit any  
2 evidence concerning the only alleged misrepresentation in  
3 this case.

4 Now, it is true, Your Honor, that some of the  
5 evidence they submitted consisted of anonymous customer  
6 complaints that they apparently took off of the internet,  
7 and it is true that about ten of these anonymous complaints  
8 complained about the type of wood in the pellet bags, but  
9 not even the plaintiffs contend that those customer  
10 complaints are relevant here or can satisfy their burden on  
11 summary judgment.

12 That is because of two factors. First, the law is  
13 crystal clear that a few random complaints do not prove  
14 anything about what the reasonable consumer is likely to  
15 believe and do not establish that a significant portion of  
16 consumers would hold that belief. We supported that with  
17 eight cases at pages 5 and 6 of Traeger's objections to the  
18 newly submitted evidence. The plaintiffs don't dispute that  
19 proposition that a few random comments cannot prove  
20 anything.

21 The second reason, Your Honor, is that those  
22 internet comments made anonymously are inadmissible because  
23 they are unauthenticated and they are hearsay. On summary  
24 judgment, as Your Honor knows far better than I, only  
25 admissible evidence may be considered.



1           The plaintiffs do not dispute and put up no  
2       opposition in their response to Traeger's objections with  
3       respect to the point that those consumer complaints cannot  
4       be considered because they are inadmissible.

5           Your Honor, that is all that I have unless you  
6       have questions.

7           THE COURT: I don't. Thank you, Mr. Speyer.

8           MR. SPEYER: Thank you.

9           THE COURT: Mr. Scott, do you have rebuttal?

10          MR. SCOTT: Thank you, Your Honor.

11          One thing that we didn't hear is any citation to  
12       law or any argument other than Mr. Speyer's own say-so that  
13       we have to list every single way a statement is  
14       misrepresented or is false to plead a claim based on that  
15       misrepresentation.

16          We have identified the whole statement. If you  
17       look at page 11 of our complaint it says in paragraph 61,  
18       the product packaging also stated mesquite, 100-percent pure  
19       hardwood pellets, premium 100-percent food grade hardwood  
20       pellets, grill it, flavor it. So we have identified the  
21       statement and we have identified at least one way it was  
22       false, which is meeting the standard under Rule 9(b) which  
23       require the heightened pleading standard for fraud based  
24       claims, which these arguably are.

25          We have met the pleading standard, but there is no



1 law saying, well, we didn't specifically call out that just  
2 this hickory statement was misleading. It is. It does not  
3 contain hickory. It does not contain mesquite. We didn't  
4 specifically call out pure. We didn't specifically call out  
5 hardwood. We said the whole thing is misleading. So  
6 nothing in the law requires us to say it is misleading if  
7 you read it this way and it is misleading if you read it  
8 that way. It is misleading if you read just these two words  
9 together or if you read the whole thing. We have said that  
10 this is the misleading statement. We have alleged in our  
11 causes of action --

12 THE COURT: You're saying that you don't need to  
13 amend to --

14 MR. SCOTT: No, Your Honor.

15 If you're inclined to deny our motion on that  
16 basis we would ask you to allow us to amend. If you were  
17 here during the certification hearing you would have a  
18 strong feeling of deja vu, because a lot of this was  
19 discussed with Judge Jenkins. You can see it in the  
20 briefing on the first certification motion, that they made  
21 these exact same arguments. They said, well, that was the  
22 first time it ever came up. They also said it was the first  
23 time injunctive relief ever came up and we pointed back to  
24 the complaint, specifically referencing injunctive relief.

25 Here we have also identified in our reply issues



1 where it has come up in discovery where we are asking their  
2 30(b)(6) witnesses about this. They say stuff like, sure,  
3 100-percent alder wood is what the pellets are made of in  
4 certain areas, not 100-percent mesquite, but then they go on  
5 and talk about in the same sentence one gallon of soybean  
6 oil or 1.67 gallons of mesquite oil.

7 Mr. Speyer, on his own say-so, again, said that  
8 the 22-percent number is wrong. Now, we cited to the patent  
9 application and the 30(b)(6) deposition where the 35  
10 parts lubricant and one part wood oil and 130 part wood  
11 particles is referenced. 36 out of 166 is approximately  
12 22 percent. So he is saying that, oh, it is less than one  
13 percent, but the evidence that we have put in and is  
14 undisputed shows that it is much higher than that.

15 It does not matter. 100-percent pure has meaning.  
16 100-percent pure hardwood has meaning. Mesquite 100 percent  
17 pure hardwood has meaning. Any way you read it, it is  
18 false. Our complaint, like I said, references the whole  
19 statement and we give one specific example of how reading it  
20 is false saying, hey, anyone that reads this is going to  
21 think this is actually mesquite wood when it is not.

22 Then we also say -- for the Utah Consumer Sales  
23 Practices Act we say the defendant's material false and  
24 misleading misrepresentations also violate portions of the  
25 Utah Consumer Sales Practices Act including 13-11-4(2)(b) --



1 I am reading from paragraph 125 of our complaint --  
2 indicating that the subject of a consumer transaction is of  
3 a particular standard, quality, grade, style or model when  
4 it is not. Section 13-11-4(2)(e) indicating that the  
5 subject of a consumer transaction --

6 THE COURT: Slow down. Slow down.

7 MR. SCOTT: Sorry, Your Honor.

8 -- previous representation when it was not.

9 This is paragraph 126. The defendant's conduct  
10 also violates rules adopted by the Utah Division of Consumer  
11 Protection including Utah Admin Code R152-11-3(b)(1). It  
12 goes into the variations. We are not limited because we  
13 called out a specific way when we have identified the whole  
14 statement and that it is entirely false. No matter how you  
15 cut it, it violates the law. That is why they have not  
16 cited any law saying we are limited in that way. It is  
17 relying exclusively on the say-so of counsel, which is  
18 insufficient.

19 We have cited the pleading standard in our case  
20 saying this is what is required. We cited Rule 9(b). We  
21 cited the cases interpreting Rule 9(b) saying this is what  
22 is required. If you go more into the case law, there is an  
23 analogous situation that if there is a series of fraudulent  
24 misrepresentations over time, the law says you only have to  
25 identify at least one of them to meet the pleading standard,



1 and then you have pled a claim for the whole thing.

2 If we are going to go into this nonexistent,  
3 hypothetical world where this statement is, you know -- each  
4 part can be independently -- that we were required to  
5 identify each part -- let me start over.

6 I'm sorry.

7 If we were in a situation where the pleading  
8 standard required us to treat this like separate  
9 misrepresentations rather than saying this whole thing is  
10 false like we did, we would have met the pleading standard  
11 under Rule 9(b) because we gave one specific example. That  
12 is the standard. That is the only law you have on this  
13 issue and it is correct. That is why there is no rebuttal  
14 to that. That is why we have no citations to any law is  
15 because we have met the pleading standard. We are allowed  
16 to do this.

17 Getting back to my analogy of a breach of contract  
18 claim, if I identify one breach it does not limit me to  
19 others. In fact, I lost this argument at the Utah Court of  
20 Appeals once when I said, well, they didn't plead an implied  
21 covenant claim, and Judge Harris on the Court of Appeals  
22 was, like, they pled a breach of contract claim so you knew  
23 all of the breaches were in play. That is in a case called  
24 LifeVantage vs. Hedges.

25 So this is an issue that is pretty well



1 established in the law. We are not limited to the one  
2 specific example, especially in a case like this where it  
3 has clearly been litigated, when Judge Jenkins hearing these  
4 same arguments made his statement that if they were not  
5 100-percent pure mesquite or hickory, that they were not all  
6 natural, that they were not 100-percent pure hardwood, so he  
7 heard these same arguments and reached that conclusion in  
8 his certification order. He didn't expressly reject their  
9 argument, but implicitly he certainly did.

10 So, Your Honor, if you're inclined to agree with  
11 them --

12 THE COURT: Reject or accept it?

13 MR. SCOTT: What is that?

14 THE COURT: Say that again, that last thing you  
15 said.

16 MR. SCOTT: He implicitly rejected Traeger's  
17 argument that our claims were limited to just the  
18 representation regarding what type of wood --

19 THE COURT: I thought you said that he expressly  
20 rejected your argument.

21 MR. SCOTT: No. He expressly rejected their  
22 argument. If I made that mistake, I'm very glad you caught  
23 me, Your Honor.

24 THE COURT: Maybe you didn't. Maybe I misheard  
25 you.



1 MR. SCOTT: To be clear we can read his statement  
2 again. He said that Traeger has misrepresented the content  
3 of its pellets bags because the bags are not 100-percent  
4 pure hardwood pellets of any kind, and are certainly not  
5 100-percent pure nor all natural hickory or mesquite. That  
6 is from page 8 of docket 237.

7 He heard these same arguments. This is an issue  
8 that has already been decided in this case, implicitly at  
9 least, and it is consistent with Rule 9(b) and the pleading  
10 standards that govern this case.

11 Their argument that 100-percent pure applies only  
12 to the hardwoods used is wrong, because that ignores the  
13 pellets which include a significant portion of oils. There  
14 is no reference to oils anywhere on the front of this  
15 package or anywhere on the back.

16 In fact, if you look at their packaging today it  
17 still has no reference to oils. They are still misleading  
18 consumers about what is in their pellets. They still call  
19 them hardwood pellets when they are not all hardwood.

20 Now, that is not at issue here, just this  
21 representation that it is 100-percent pure. You cannot say  
22 something is 100-percent pure mesquite, hickory, hardwood,  
23 however you read it, and have it have other ingredients  
24 including oil or have no mesquite or hickory. There is no  
25 other way to interpret this.



1 I had a couple of notes that I wanted to bring up  
2 here.

3 We're talking about the Utah Consumer Sales  
4 Practices Act. Again, there is dearth of law on the Utah  
5 Consumer Sales Practices Act so we end up relying a lot on  
6 the plain language of the statute. He says causation is an  
7 element of both damages or injunctive relief, but the  
8 statute does not say that and they cite no cases applying it  
9 in that way.

10 In fact, Judge Jenkins specifically rejected that  
11 argument. I know he just said, no, he didn't, but I will  
12 read you the exact language so there is no doubt that he  
13 did.

14 The statute says whether a consumer seeks or is  
15 entitled to recover damages or has an adequate remedy at  
16 law, he may bring a class action for declaratory judgment,  
17 an injunction and appropriate ancillary relief.

18 Judge Jenkins -- if I can find it. We cited it in  
19 here. I am sorry, Your Honor. It is taking me a second to  
20 find it and I apologize.

21 Judge Jenkins said the plaintiffs may proceed with  
22 a Utah class action seeking declaratory relief, injunctive  
23 relief and appropriate ancillary relief under the Utah  
24 Consumer Sales Practices Act without showing loss causation.

25 Now, Mr. Speyer brought up some examples that this



1 is some random person -- that brings up standing issues  
2 that are not relevant here. So there is a safeguard in  
3 place for that.

4 Also, Mr. Speyer ignores the definitions of the  
5 statute which defines consumer transactions and consumers in  
6 a way that would also preclude that. So that was a red  
7 herring that the Court should not consider and it is not at  
8 issue here.

9 Our plaintiffs and our entire classes were  
10 purchasers of these pellets. They do not have to show loss  
11 causation. They could not have any loss and they could be  
12 angry and frustrated and think it was deceptive.

13 Now, the loss is not relevant here. Mr. Speyer  
14 said that our motion for summary judgment on damages should  
15 be denied. That is fine, because it does not exist. We  
16 made it clear in our motion that we were not seeking damages  
17 at this point in our case. We are seeking a declaration  
18 that the misrepresentations that Traeger made violate the  
19 Utah Consumer Sales Practices Act and the statutes. So to  
20 the extent the Court -- there is nothing to deny basically,  
21 Your Honor. We didn't seek damages in our motion for  
22 summary judgment, so there is no portion of our motion to  
23 deny on that. I don't think we could have been more  
24 explicit about not seeking damages as part of it. We said  
25 specifically that that issue was reserved.



1 THE COURT: What else do you want to tell me?

2 MR. SCOTT: As far as the California statutes go,  
3 we had a couple of points there that I wanted to bring up.  
4 He said we had no evidence of materiality or reliance. Now,  
5 again, we are in a situation where the statements on their  
6 face are false. The statements at issue, no matter how you  
7 cut it, and no matter how you look at this, break it up,  
8 keep it as a whole, it is false on its face. We don't have  
9 to prove that anyone was specifically misled when the  
10 statement itself is false.

11 Now, we do have evidence of it and they don't like  
12 it, and we have our own plaintiffs saying they were misled  
13 and that is sufficient under California law. They don't  
14 like it, but that is the law. We also have their own  
15 research showing that 99.25 percent of consumers thought it  
16 was important or the reason they buy being 100-percent pure  
17 hardwood. They can't get around that. Judge Jenkins when  
18 confronted with that exact same argument asked if their  
19 marketing department had been fired over this, because we  
20 have nearly a 100-percent swing the other direction.

21 Again, they have consistently tried to limit the  
22 claims to not dealing with the whole statement, just to  
23 dealing with the one part because they know they lose on  
24 that. So they hired their experts to do this and ignored  
25 the rest. When we are dealing with the motion to dismiss



1 which they brought up, that was very early on in the case  
2 and we are not required at that point to lay out all of our  
3 claims and we don't need to because, as you see, Your Honor,  
4 we are still here.

5 THE COURT: I do see that.

6 MR. SCOTT: The motions to dismiss on whatever  
7 basis were not completely successful.

8 So talking about failed motions to dismiss and  
9 what was brought up in those is not very relevant when we  
10 talk about what has actually been briefed in the case and  
11 when the same issue has been briefed and we are here still.

12 So, Your Honor, we meet the requirements of each  
13 of our claims, which are fairly minimal. We just have to  
14 generally show that the statements were false and we have to  
15 show -- under Utah that is it, really, that they violated it  
16 and that it was inconsistent with the language of the  
17 statute, boom, and that is it and that is all that we have  
18 to show, and the knowing and intentional thing.

19 We cited the statutes and the law on knowing and  
20 intentional and they cite -- the only thing they have saying  
21 we require more under the Utah Consumer Sales Practices Act  
22 is one line from a case. That is it. The concepts of  
23 knowing and intentional are well defined in the law. They  
24 didn't cite anything contradicting the statutory definition  
25 of knowing, which means they were aware of the circumstances



1 and they absolutely were and they controlled the  
2 circumstances. They did the studies to show what was  
3 important and they put it on the bags without regard to the  
4 truthfulness of those representations.

5 So, Your Honor, we meet the elements. To the  
6 extent that Your Honor finds that one or more elements under  
7 the California statutes is missing, which we say there is  
8 not, absolutely not, and we have met every requirement and  
9 we laid out how, and they don't like it and they say, well,  
10 that is not the law, even though we cite law supporting it,  
11 and they say we have no evidence, even though we cite to  
12 evidence, at the end of the day we have met those  
13 requirements.

14 If Your Honor has any concerns about them you can  
15 still under Rule 56 enter a finding saying it violated the  
16 statutes as long as it was relied upon, and that goes to the  
17 damages issue again, but not to the actual violation, even  
18 under the California statutes. Your Honor is allowed to  
19 make partial findings if you are persuaded, and if you are  
20 persuaded that we have not somehow met the pleading  
21 standards, we would seek leave to amend.

22 THE COURT: Thank you, Mr. Scott.

23 Thank you all.

24 I will take this motion under advisement and get a  
25 ruling out in due course.



We'll be in recess.

MR. SCOTT: Thank you, Your Honor.

MR. SPEYER: Thank you, Your Honor.

(Proceedings concluded.)